Supreme Court, U.S.
FILED
99 488 OCT 21 1999
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No. _____

In The Supreme Court of the United States

MIGUEL A. RODRIGUEZ,
Petitioner,

v.

MUHLENBERG HOSPITAL CENTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF ISSUE

Did The District Court Properly Determine That Rodriguez's Evidence Did Not Cast Sufficient Doubt Upon Muhlenberg Hospital Center's Reason For Terminating Rodriguez's Employment, When Rodriguez Was Terminated For Striking A Patient?

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No.

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October Term, 1999

MIGUEL A. RODRIGUEZ,

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v.

MUHLENBERG HOSPITAL CENTER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

Rodriguez is an Hispanic male born 62 years ago in Puerto Rico. Since 1984, the Muhlenberg Hospital ("Hospital") continuously employed Mr. Rodriguez as a security guard.

In the early 90s, Rodriguez, as part of his job, drove hospital vehicles. In 1991, the Commonwealth suspended Rodriguez's driver's license for 90 days as a result of a "DUI" conviction. Although Rodriguez was unable to do his job as a result of the license suspension, the Hospital neither suspended nor fired him. In fact, the Hospital permitted Rodriguez to continue working, in a non-driving capacity, during the 90 day license suspension period. Rodriguez concedes, moreover, that the Hospital had always treated him "very fairly" up until his discharge.

On October 28, 1995, Rodriguez, during his second shift, was involved in an altercation with an unruly, drunk patient in the Hospital's Emergency Room ("ER"). The Hospital investigated the ER incident after an ER nurse reported that Rodriguez had struck the patient.

William Mason was then the Hospital's President and Chief Executive Officer ("CEO"). Jeffrey Beich was the Hospital's Vice-President of Operations and Chief Operating Officer. Mason and Beich had worked together at the Hospital for 15 years.

Beich reported to Mason that the investigation revealed that Rodriguez had, in fact, struck the unruly patient in the ER. Mason, the Hospital's President and CEO, had final authority over the decision to terminate Rodriguez. After Beich told Mason that Rodriguez had, in fact, struck the unruly patient in the ER, Mason decided to fire Rodriguez. Mason decided to terminate Rodriguez because, in Mason's view of Hospital

policy, under no circumstances should a Hospital employee ever strike a patient.

Rodriguez denied striking the patient. Rodriguez admits, however, that had he struck the patient, he would have violated Hospital policy, which would have been grounds for his immediate termination. In fact, every witness who testified in Rodriguez' case-in-chief stated unequivocally that Hospital policy flatly prohibited Rodriguez from striking the patient.

Rodriguez testified that he knew of no other Hospital employee, during his eleven (11) year employment, whom the Hospital treated unfairly, or discriminatorily, on account of his or her age or Hispanic national origin. Rodriguez also testified that the Hospital, at least until his discharge, had treated him "very fairly."

REASONS FOR DENYING THE WRIT

The instant petition does not present this Honorable Court with any controversial legal principles or conflict among the Circuit Courts of Appeals warranting review. The issues in this case, both legally and factually, are unremarkable.

In short, the only issue raised on appeal is whether, factually, Petitioner presented enough evidence to the jury to establish that the Hospital's decision for terminating him was pretextual. Rodriguez failed to produce sufficient evidence, at trial, thereby warranting the trial court's granting the Hospital's Motion for Judgment as a Matter of Law pursuant to Fed. R. Civ. P. 50(a).

Rodriguez questions not the reason for his discharge, but to the contrary, the wisdom of the judgment to terminate his employment.

The standard for the granting of a judgment as a matter of law is well-settled: viewing the evidence in a light most favorable to Petitioner, the court must determine whether a jury could properly decide in the Petitioner's favor. *Walter v. Holiday Inns, Inc.*, 985 F.2d 1238 (3d Cir. 1993).

The district court at trial, and the Third Circuit Court of Appeals, concluded that Rodriguez had failed to adduce sufficient evidence to warrant submission of the issue to the jury.

In order for Rodriguez to have prevailed, he must have first established a *prima facie* case of discrimination. To establish a *prima facie* case under Title VII or the Age Discrimination in Employment Act, Rodriguez needed to show (1) he was a member of a protected class (Hispanic and over 40); (2) he was qualified for the position; (3) he was dismissed despite being qualified; and (4) he was replaced by a person sufficiently younger to allow an inference of discrimination.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); *Billet v. CIGNA Corp.*, 940 F.2d 812 (3d Cir. 1991).

Rodriguez satisfied the *prima facie* case requirement. Nevertheless, merely satisfying the *prima facie* requirement does not end the inquiry. Upon establishing a prima *facie case*, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802. The Hospital met this burden by establishing that Rodriguez was fired because he struck a patient. In this regard, the Hospital CEO testified that, based upon his understanding of the facts, there was no doubt in his mind that Rodriguez's behavior was inappropriate.

Once the employer, as here, comes forward with a legitimate reason for the discharge, the burden shifts back to Rodriguez to set forth evidence which would have allowed the fact finder to either (1) disbelieve the employer's proffered reason, or (2) conclude that discrimination was more likely the primary motivation behind the firing. *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994). It is here where Rodriguez failed.

Rodriguez argued that he produced evidence from which a fact finder could disbelieve the Hospital's stated reason. Such evidence, however, must be sufficient to establish more than that the stated reason was wrong, but that it was so plainly wrong that it could not have been the true reason for the discharge. *Keller v. Orix Credit Alliance Inc.*, 130 F.3d 1101, 1109 (1997).

Rodriguez's "pretext" argument consists solely of an alleged divergence between the understanding by the Hospital's CEO, Mr. Mason, the decision maker, of the Hospital's "use of force" policy and the alleged policy set forth by Rodriguez.

This position is incorrect. Rodriguez bases his pretext argument on a document that was never identified as Hospital

policy. First, no witness at trial identified the policy alleged by Rodriguez as, Hospital policy with respect to the use of force. While Mason testified that the Hospital had a written "use of force" policy, he was unable to identify it. Rodriguez, too, testified that he could not remember ever receiving the document in question as the Hospital "use of force" policy. Rodriguez, however, did remember receiving a "SECURITY" policy. The "SECURITY" policy does not address "use of force."

Both Rodriguez and Mason also testified that the Employee Handbook's patient abuse "Termination" provision reflected Hospital policy that would have justified Rodriguez's immediate termination had Rodriguez struck the ER patient.

Even assuming that the document identified by Rodriguez was the Hospital's use of force "policy" at the time of his discharge, Rodriguez admitted that, had he hit the patient, he would have been in violation of this alleged "policy." In fact, Rodriguez admitted time and again that had he struck the patient he would have been in violation of Hospital policy, and his termination would have been justified.

Rodriguez, then, placed all of his "pretext" eggs at trial in the flimsiest of "policy" baskets. The sole evidence of pretext he points to is the so-called "difference" between the alleged policy's minimum force requirement and Mason's understanding, based on practice and the Employee Handbook's "patient abuse" language, that an employee's striking of a patient always constitutes an unacceptable use of force. Rodriguez admits, moreover, that had he struck the patient, he would have offended the policy's minimum use of force requirement.

Critically missing from both Rodriguez's proof and argument, moreover, is a nexus or logical connection between Mason's understanding and application of the Hospital's "use

of force" policy and Rodriguez's age and/or national origin. That is because no such connection or nexus exists.

Assuming that the policy identified by Rodriguez was the Hospital's use of force "policy" and that Rodriguez used the appropriate, minimum level of force under that "policy," Mr. Mason's so-called misapplication of this "policy" does not, on this record, render his decision to fire Rodriguez pretextual, as

> to discredit the employer's proffered reason...the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, or competent.

Fuentes, 32 F.3d at 765. Mason's alleged misapplication of the minimum use of force "policy" does not therefore cast substantial doubt on the honesty of the reason that Mason had for firing Rodriguez: the striking of a patient.

The court's agnosticism regarding challenges to the wisdom, measure and mercy of personnel decisions is well-taken. Federal judges, courts and/or juries are ill-suited to act as personnel boards ruling on the strength or wisdom of "cause" for discharge. *Keller*, 130 F.3d at 1109; *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996) ("[F]ederal courts are not arbitral boards ruling on the strength of cause for discharge. The question is not whether the employer made the best, or even sound, business decision; it is whether the real reason is [discrimination].").

This Court, then, must not confuse possible disagreement about the wisdom of Mason's decision to fire

Rodriguez with disbelief about whether that reason was genuine. *See e.g., Combs v. Planation Planters*, 106 F.3d 1519, 1543 (11th Cir. 1997) ("[A] plaintiff may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reason, at least not where, as here, the reason is one that might motivate a reasonable employer."), *cert. denied*, 118 Ct. 685, 139 L. Ed. 2d 632 (1998); *Smith v. Stratus Computers, Inc.*, 40 F.3d 11, 16 (1st Cir. 1994), *cert. denied,* 514 U.S. 1108 (1995) (stating that relief will not be granted "to a plaintiff who has been discharged unfairly, even by the most irrational of managers, unless the facts and circumstances indicate that the discriminatory animus was the reason for the decision").

This Court has instructed time and again that courts "must not infer a particular type of discrimination from circumstances that merely indicate a wrongful firing of some sort." This is just what Rodriguez, by his strained "misapplication of policy" argument, is asking this Court to do. *Walton v. Mental Health Ass'n of Southeastern Pennsylvania*, 168 F.3d 661, 669 (3d Cir. 1999); *Keller*, 130 F.3d at 1111 (a reasonable Fact-finder could draw only a "relatively weak inference" from the employer's failure to criticize an age plaintiff's job performance before termination); *Robinson v. National Medical Care, Inc.*, 897 F. Supp. 184, 186 n.4 (E.D. Pa. 1995) (the employer's tardiness in reviewing the race plaintiff's job performance does "not justify an inference of pretext absent evidence of disparate treatment"), *aff'd*, 77 F.3d Cir. 1996) ; *see also, EEOC v. Texas Instruments Inc.*, 100 F.3d 1173, 1182 (5th Cir. 1996) ("This court has observed that an employer's disregard of its own hiring system does not of itself conclusively establish that improper discrimination occurred or that a nondiscriminatory explanation for an action is pretextual. A discharge may well be unfair or even unlawful and yet not be

evidence of age bias under the ADEA. **To make out an ADEA claim, the plaintiff must establish some nexus between the employment actions taken by the employer and the employee's age. A bald assertion that one exists...simply will not suffice.**") (case citations and internal punctuation omitted). Mere possibilities or conjectures of pretext, then, do not entitle discrimination plaintiffs to a free jury pass. *Tenthoff v. McGraw-Hill, Inc.*, 808 F. Supp.403, 407 (E.D. Pa.), *aff'd*, 981 F.2d 1248 (3d Cir. 1992).

Shepherd v. Slater Steels Corp., 168 F.3d 990 (7th Cir. 1999) underscores the steadfast judicial unwillingness to infer pretext from merely "unfair" adverse employment decisions involving discrimination plaintiffs. The plaintiff, Lincoln Shepherd, Jr., brought a Title VII sexual harassment and retaliatory discharge lawsuit against his former employer, Slater Steels Corporation ("Slater"). The crux of this lawsuit was that Mr. Shepherd's co-worker, Edward Jemison, through sexually-charged remarks and outrageous behavior, had rendered Mr. Shepherd's work environment hostile and that Slater ultimately discharged Mr. Shepherd in retaliation for complaining of Jemison's sexual harassment. *Id.*, 168 F.3d at 1000.

Although Mr. Shepherd had complained to his supervisors about Jemison's at times brutal sexual harassment, Slater failed to take prompt, appropriate remedial measures. Due to Slater's failure to remedy, the tension between the men grew daily and both men came to blows on company premises. Afterwards, both men were discharged for fighting. *Id.*, 168 F.3d at 1012. The district court entered summary judgment in favor of Slater on the retaliatory discharge claim, and the Seventh Circuit affirmed.

Shepherd conceded that fighting was legitimate grounds for termination. *Id.*, 168 F.3d at 1012 n.12. He argued,

however, that his discharge was unfair because the fight resulted from Slater's lackluster investigation and failure to act promptly in stopping the harassment . *Id.* The Seventh Circuit, however, rejected this "unfairness as pretext" argument:

> The question before us, however, is not whether engaging in an altercation is or is not an appropriate ground for discharge... . The only issue that concerns us is whether the stated ground is the real reason that Slater discharged Shepherd. If, as Shepherd contends, the fight was the inevitable result of Jemison's unchecked harassment, then that would certainly reflect on the adequacy of the steps that Slater took to investigate and respond to Shepherd's complaints. **But absent some proof that Slater itself did not genuinely believe that the fight warranted discharge -- that it did not fire other employees who fought so ferociously, for example -- we cannot say that the reason for Shepherd's discharge was pretextual simply because the company may have been unfair.**

Id., 168 F.3d at 1012 n.12 (bold type added).

Similarly, Rodriguez' evidence did not place in dispute the Hospital's decision maker's genuinely held belief, one formed after an investigation, that Rodriguez had struck the patient and that this conduct warranted Rodriguez' immediate termination. In addition, Rodriguez offered no evidence that any non-protected Hospital employees engaged in similar conduct but were not terminated. In sum, the reason for Rodriguez' discharge was not pretextual merely because Rodriguez perceived his firing as unfair.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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DATED: October 21, 1999